



Workplace View

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Taking the Stress out of Employee Claims for Psychological Injury/Illness

Claims made by employees seeking payment of workers' compensation for stress or other psychological injury/illness can arise out of administrative or disciplinary action taken by an employer against an employee. Dealing with these claims can be a minefield for employers, but so long as the action taken by the employer is fair and reasonable, such claims are generally unlikely to be successful.

Following are four recent cases where workers have been unsuccessful in their compensation or damages claims against employers for psychological illness caused or aggravated by work, and one recent decision where the employee was successful.

Case 1: *Dunkerley v Comcare* [2012] FCAFC 132

At the Department of Education, Science and Training, a worker unsuccessfully claimed workers' compensation for a psychological injury suffered after failing to gain a promotion following an interview.

After her interview, when it was mentioned to her that she was never really a contender but was invited to interview because of her positive attitude, she claimed the '*humiliation*' aggravated her pre-existing work related adjustment disorder. The worker claimed that the recruitment advisory committee (**committee**) was bound to follow the recruitment policy, which stated that, '*only candidates with very strong claims to a position should be short-listed for interview*'.

The Full Court of the Federal Court found that whether or not the policy was binding, the committee had followed the recruitment policy – because it included a considerable degree of flexibility by stating that the '*method of short-listing*' was a matter for each committee to determine. The Court found that the chair of the committee had acted fairly in highlighting the worker's strengths to the committee when deciding who to short-list. To not have considered the worker for the promotion would have been less than fair. The actions of the employer were found to be reasonable administrative action.

Case 2: *Gordon and Comcare* [2012] AATA 578

After joining the Australian Federal Police (**AFP**) in 2003, a worker claimed that postings to isolated Jervis Bay and to Canberra, rather than Brisbane where he was promised, had by 2009 led to depression, anxiety and self-harm.

The Administrative Appeals Tribunal (**AAT**) found that while inadequate training and support may have contributed to the worker's angst, his intense grievance over the Brisbane posting was a '*recurring feature in the evidence*'. The employer demonstrated that there was no evidence that the AFP recruiter had promised a Brisbane posting. The workers' compensation claim was rejected on the basis that the employer had not broken promises made to the worker and its actions were reasonable.

Case 3: Jablonka and Comcare [2012] AATA 627

At the Australian Tax Office (**ATO**), a worker claimed victimisation and a consequential psychological injury after a meeting with her supervisor. At the meeting the worker had explained she was unhappy with the changes to her duties following a restructure and sought back-pay for work she claimed she performed at a higher level than her classification had provided. When the supervisor refused to provide back pay she threatened legal action. The supervisor warned that there could be serious repercussions if she took legal action which she interpreted as '*threats*'.

The AAT found that while the evidence supported the view that the rejection of the worker's request for backdated remuneration was a major factor in the aggravation of her psychological condition, as there was no mechanism within the ATO to pay back-pay the action was reasonable administrative action.

Case 4: Siatris v Illesinge & Prasantha [2012] C10345790

In Victoria, the Magistrates Court dismissed the damages claim of a childcare worker for psychological injury, alleged to have arisen from receiving 'bullying' warning letters from her employer.

The worker had been issued with a number of warning letters highlighting her failure to properly care for children and report accidents. She left after being transferred to another centre with reduced hours. The worker alleged she had not been spoken to before receiving the warning letters or given any training or counseling to follow up. She alleged the work incidents aggravated an underlying psychiatric condition.

The employer was able to demonstrate they had taken action on reasonable grounds in a reasonable manner considering the worker's ongoing performance issues, including her memory difficulties. The Court found that the employer demonstrated it had done its best to accommodate the employee's '*shortcomings*'. The Court was further not persuaded by the evidence that the worker's employment was a significant factor aggravating her pre-existing condition.

Case 5: State of Queensland (Queensland Health) AND QCOMP and Tracy Connors (WC/2010/173)

In this case a worker **was successful** in her claim for compensation on the basis of a psychological injury arising from the distress of workplace investigation. By letter, the employer requested that she be interviewed by an independent investigator as a '*witness*' in relation to an investigation of the '*conduct of*' her manager. As the worker

was assured by the employer that the investigation '*was not about her*', she declined the option of bringing a support person to the interview. At the interview, it was revealed that the investigation was in relation to claims that her manager had hired her because they were in a relationship together. The worker claimed her subsequent distress from being asked '*personal questions about her own private relationship and life*' led to psychological injury.

The Queensland Industrial Relations Commission found that the investigation was not conducted in a reasonable way. Prior to the interview, the employer should have properly disclosed the issues to be raised with the worker and should have advised her to ensure a support person was present. The accusations against the manager were serious enough to involve the police (as the manager had allegedly not checked the worker's citizenship or visa details), and it was unclear under what authority the independent investigator was acting.

Implications for employers

Dealing with employee mental health issues can be one of the most challenging and sometimes expensive situations for an employer.

Former Australian of the Year, Professor Patrick McGorry, recently called on employers not to label mental illness symptoms as character-related when in fact they are health related. He argues that a better understanding of this would lead to less reactive responses in the workplace to the emotions that come with mental ill health.

There is no doubt that both employers and employees are best served with improved education and training, and tailored systems in place (and practiced) that aim to identify and manage psychological health risks.

Where employers cannot avoid a claim by an employee alleging that work has caused or aggravated a psychological illness, a key part of the defence for employers, is demonstrating they have acted reasonably in the circumstances. The cases show that employers are best equipped to do this when they can rely on an established process that has been followed fairly.

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